

# *Child Custody & Visitation*

When a couple separates or divorces, the most difficult issues involve the children. The ultimate question every parent should ask is “what is in the best interest of my child?” This fact sheet will answer some of the basic questions you may have regarding custody and visitation.

## **Q. What types of custody are there?**

A. The two elements of custody are “legal” and “physical.” Legal custody is the responsibility and authority to make decisions for and to take care of the child. Physical custody is the right to see and spend time with the child. Each element may be given solely to one parent or may be shared. Thus, one parent may have sole legal custody and shared physical custody. Just because custody is shared does not mean the division is 50/50; the actual division depends on the child’s age, parents’ availability and desires, and other factors.

## **Q. Who gets custody of the children in a separation?**

A. When a couple separates, it is usually up to the couple to agree on the custody arrangement. Once there is an agreement, it is best to put it in writing with both parents’ signatures. The agreement on child custody can be part of a larger separation agreement. If you and your spouse can’t agree, however, then a judge will have to decide this issue. The judge usually looks at who the primary care-provider was during the marriage and during any period of separation; and the current ability of each parent to provide for the physical, emotional, educational, social, and religious needs of the child, given the child's age, sex, educational and behavioral history, hobbies, and any special needs, as well as the parent's past history, education, work schedule, living arrangements, etc.

## **Q. If we file for divorce, can the judge modify the custody arrangement set out in our separation agreement?**

A. Yes. The terms of the separation agreement regarding child custody, support, and visitation can be modified by the judge in the best interests of the children. In the absence of evidence to the contrary, however, the judge will likely accept your separation agreement.

## **Q. How much child support is required?**

A. Each state has minimum child-support guidelines, and this is one area where the judge will examine the separation agreement closely, to make sure it meets the state requirements. Online child support calculators or your legal assistance attorney can help you calculate estimated child support payments. Generally, the custodial parent will receive between 17% and 23% of the non-custodial parent's gross income for one child and between

24% and 33% for two children. Gross income often includes military entitlements, such as BAH and BAS.

**Q. Can our separation agreement provide for the children's college education?**

A. Most states usually don't require child support for a child in college, but you may include child support, tuition, and other college expenses in the separation agreement.

**Q. Who should claim the children's tax exemptions?**

A. This is completely up to you and your spouse. One or the other parent can keep the exemption forever, or you can alternate every year, or you can split the exemptions of multiple children. If you and your spouse can't agree, the default rule gives the parent who has physical custody of a child for more than half the year gets the exemption for that child.

**Q. What kind of visitation is required?**

A. Ordinarily the non-custodial parent is entitled to reasonable visitation rights with a minor child, except in extraordinary situations, such as when there has been a history of abuse or other misconduct. Visitation schedules can be very flexible and unstructured, or they can be highly structured and rigid, with dates and times set out with great specificity. A common agreement would provide for "reasonable" visitation following "reasonable" notice to the custodial parent. Visitation often includes four to eight weeks of continuous visitation in summer and two weeks continuous visitation during alternate Christmas seasons. Visitation on Father's/Mother's Days, alternate birthdays of the child, alternate Thanksgivings, and other special days should also be considered.

As a practical matter, it is often very difficult for a military parent to have regular visitation with a child. For military parents it's important that the separation agreement include the right to take the children out of their State of residence, including overseas. The separation agreement should also address the issue of travel expenses. Usually the visiting parent is responsible for those.

**Q. Will a separation agreement prevent the other parent from snatching my child?**

A. No. There are criminal laws against "parental kidnapping," but they usually apply only if there is a court order. A separation agreement is not a court order, but simply a contract between you and the other parent. If you can locate the other parent, you may be able to get a court to punish him or her financially for breaching the contract.

If you are concerned about the possibility of the other parent taking the child and the other parent is in the military, then ask the parent's commander to order the parent not to remove the child from the area. It is a criminal violation for the soldier to disobey such an order. If the other parent is not in the military, you may be able to get a temporary restraining order or similar order from a local court.

**Q. Will custody be settled when I obtain a divorce?**

A. Yes, usually. A court will only make a custody order if asked to do so. As a practical matter, most divorce actions usually do include a custody request so the parties don't have to go to court twice.

**Q. Can a legal assistance attorney help me get a custody or divorce decree in court?**

A. No. You need a private attorney in the state with jurisdiction for that.

**Q. Can a custody order be changed?**

A. Custody orders can be changed. Once a parent is awarded custody in a court order, however, the judge can change the custody order only if there is a substantial change that has a significant effect on the children.

If the parents want to change the custody arrangements for any reason, they should go back to court to modify the original court order. Failure to do that may leave the new custodial parent still liable for child-support payments owed under the original court order.

**Q. If the other parent does not like the present custody order, can he or she file for custody in another state?**

A. Under the Uniform Child Custody Jurisdiction and Enforcement Act, which is in effect in nearly every state, the court that granted the original order will generally be the only court that can modify the order. Only if the child and both parents have left that state will another court be able to modify the existing order. Thus, until the court that originally entered the custody order loses or releases jurisdiction of the case, no other court may take jurisdiction to hear it, unless there is a genuine emergency, and even then, the new order will probably be limited to dealing with the emergency.

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